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No. 03-1348

IN THE

Supreme Court of the United States

EDMUND KO,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

REPLY BRIEF

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03-1348

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2003

EDMUND KO,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of the State of New York, Appellate Division, First Judicial Department

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REPLY BRIEF FOR PETITIONER

Petitioner Edmund Ko respectfully submits this brief in reply to the Brief for Respondent ("Brief"), which, by order of this Court, was submitted in opposition to Petitioner's petition for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, in this case.

To the extent that not all of Respondents contentions are addressed herein, Petitioner submits that his principal petition adequate anticipated, and appropriately addressed, such remaining issues.

A. Petitioner Only Requested That Claudia Seong's Statement, Admitting Ownership of the Clothing, Be Admitted as a Declaration Against Penal Interest; Petitioner Never Sought to Admit Her Hearsay Statement Ascribing Ownership to Him as Well

As demonstrated in the petition for certiorari, prior to trial, the District Attorney brought an application to preclude the defense from introducing, *inter alia*, a statement attributed to Claudia Seong wherein she had admitted ownership to the police of certain clothes found at the homicide scene. Upon considering that singular issue, the trial judge agreed that such a "statement [is] against Ms. [Seong's] penal interest, and I am admitting it for that purpose."

At no time did the prosecutor indicate that she intended to introduce other statements made by Seong to police. Indeed, unlike the limited statement which the defense sought to offer, those statements by Seong purportedly implicating Petitioner could not be categorized as hearsay exceptions.

Nonetheless, Respondent argues that "[f]or the most part, the prosecutor did not elicit more than petitioner had asked for or than the court had allowed." Brief at 17-18. But as Respondent necessarily then concedes, "[i]t is true that Detective Mooney testified that Seong told him that the pants belonged to petitioner and the shirt was hers, while petitioner's offer of proof was that Seong had told the police that all of the clothing was hers." *Id.*

As shown, however, the latter portion was as inadmissible as the former was appropriately sought to be introduced. As the trial judge determined, the former was a declaration against Seong's own penal interest, while the latter, wherein she implicated Petitioner, amounted to rank, and

unverifiable hearsay, the admission of which completely undermined Petitioner's confrontation rights.

Moreover, Petitioner's trial attorney adequately preserved the federal question for review -- which, as shown in the Petition for certiorari, the Appellate Division addressed on the merits. Indeed, in the course of arguing that his cross-examination of the detective was being impaired, counsel urged:

> I am permitting [sic] under the confrontation clause to question this witness with respect to this conversation beyond the mere words on the page given that your Honor permitted over objection without limiting instruction to the jury, the prosecutor, not the defense, who had opposed a motion in limine to allow the defense to get it in evidence...

In any event, because Petitioner and Respondent, while reading the same record, arrive at diverse interpretations, it is fitting, as Petitioner earlier requested, that the matter be returned to the Appellate Division to evaluate the entirety of the proceedings in light of Crawford v. Washington, _U.S._, 124 S.Ct. 1354 (2004). Upon such remand, Petitioner is more than willing to deal with any ultimate determination by that court as to whether the issue raised is implicated by Crawford, from the standpoints of both reviewability and the purported violation of Petitioner's confrontation rights.

B. Petitioner Certainly Did Seek to Litigate the Federal Question Underlying the Introduction at Trial of the "Present Sense Impression" Statement

Respondent challenges Petitioner's procedural ability to address the introduction at trial of the deceased's present sense

impression statements. It is urged, in this regard, that "this Court is without jurisdiction to hear this claim, as petitioner did not raise a federal question either at trial or on his direct appeal and the state court's decision rested only on state law. 28 U.S.C. §1254; Adams v. Robertson, 520 U.S. [83] [1997]; Illinois v. Gates, 462 U.S. 213 (1983)." Brief at 19. *See also* Brief, at 19-20 ("petitioner never raised the claim that hearsay upon which the prosecutor would be relying violated the Confrontation Clause of the Federal Constitution, only that the prosecutor could not meet the burdens imposed under New York's rules of evidence").

To be sure, on his state appeal, Petitioner argued, in large part, that the subject statements had not met the tests carved out by New York cases However, Respondent's contention that such was the whole of Petitioner's argument is rather unencumbered by a full review of Petitioner's Brief before the Appellate Division.

In the first place, the very point heading of this portion of Petitioner's brief before that court read as follows:

> The Trial Court Committed Reversible Error, and Violated Defendant's Federal and State Constitutional Rights to Due Process of Law and Confrontation, by Allowing into Evidence the Double Hearsay Testimony of the "Telephone Witness," Se-Ok Oh, Which Failed to Satisfy the Requirements for Either "Declarations of Intent" or "Present Sense Impressions."

Thereafter, in concluding the discussion concerning the admissibility of the "present sense impression" statements, Petitioner argued:

> It follows that, absent the requisite

> corroboration, the concern expressed in [People v.] Brown, [80 N.Y.2d 729, 594 N.Y.S.2d 696 (1993)] has come to fruition -- *i.e.*, that "[t]he admission of a hearsay statement under any exception deprives the defendant of the right to test the accuracy and trustworthiness of the statement by cross-examination." (80 N.Y.2d 736). *See also* Idaho v. Wright, 497 U.S. 805 (1990) and Ohio v. Roberts, [448 U.S. 56, 66 (1980)] (discussing "particularized guarantees of trustworthiness").

It was then concluded that because, "in the absence of the requisite corroboration, there were no guarantees of trustworthiness, the statements should never have been admitted as present sense impressions. Therefore, their introduction deprived Defendant of fair trial rights to confrontation and due process of law."

Conclusion

As to the Second and Third Questions Presented, the Petition Should Be Granted and the Matter Remanded to the Appellate Division, First Department, for Further Consideration in Light of Crawford v. Washington.

Dated: New York, New York
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Respectfully submitted,

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